FILED DECEMBER 23, 2009

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **SHARON L. BARNES** **Member No. 140413** A Member of the State Bar.	)	**Case No.: 04-O-13151** **DECISION**

INTRODUCTION

Respondent is charged here with willfully violating (1) rule 4-100(B)(4) of the Rules of Professional Conduct[1] [failure to pay client funds promptly]; (2) rule 4-100(A) [failure to maintain client funds in trust account]; (3) Business and Professions Code section 6106[2] [moral turpitude-misappropriation]; (4) rule 4-100(A) [failure to deposit client funds in trust account]; (5) section 6106 [moral turpitude-issuing NSF checks]; and (6) rule 4-100(A) [misuse of CTA]. The State Bar had the burden to prove the above charges by clear and convincing evidence. The court finds culpability and recommends discipline as set forth below.

PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed in this matter by the State Bar of California on June 19, 2008. On July 29, 2008, respondent filed her response to the NDC. Trial

[1] Unless otherwise noted, all future references to rule(s) will be to the Rules of Professional Conduct.

[2] Unless otherwise noted, all future references to section(s) will be to the Business and Professions Code.

was commenced on April 22, 2009, but, due in part to the substantial illness of the respondent, not completed until July 22-23, 2009, followed by a period of post-trial briefing. The State Bar was represented at trial by Deputy Trial Counsel Christine Souhrada. Respondent was represented by Edward O. Lear of the Century Law Group, LLP.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on the stipulation of undisputed facts and conclusions of law previously filed by the parties and on the documentary and testimonial evidence admitted at trial.

Jurisdiction

Respondent was admitted to the practice of law in California on June 6, 1989, and has been a member of the State Bar at all relevant times.

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On July 30, 2003, Eagle Credit Resources, LLC (Eagle) employed Respondent and her law office to provide collection litigation services on accounts receivable owned by Eagle. Respondent agreed to provide those services and an agreement was reached whereby Respondent would provide services on a contingent fee basis, receiving 30% of the amounts collected. This agreement further provided that Respondent was to remit to Eagle its share of each month's collection proceeds within 15 days after the end of the month in which the amount was collected.

Respondent employed a number of non-attorney staff to assist her in these collection efforts, including Antrion (possibly spelled Antyreon) Cambric (Cambric).

The relationship between Respondent's office and Eagle was good until January 2004, when Eagle became concerned by the fact that the monthly disbursement check forwarded by Respondent's firm was returned for insufficient funds. Since Eagle expected that funds collected

on its behalf would be held in an account for its benefit until being disbursed to Eagle, the issuance by Respondent of an NSF check was reviewed as a "red flag" of possible problems.

Eagle's concern grew even greater when the disbursement check for February 2004 also bounced. Although Respondent made good these funds after some delay (using borrowed funds), Eagle decided to conduct an unannounced audit of Respondent's operations.

The audit was conducted on April 5, 2004, prior to Eagle receiving Respondent's monthly report and disbursement for funds collected during the month of March. At the time Eagle's representatives arrived at Respondent's office, Respondent was out of the office attending a funeral. During the audit, a number of errors were identified for the prior months' accountings. As a result, a cashier's check in the amount of $6,868.23 was issued on April 5 by Respondent's office for funds previously collected but not previously disbursed. At the conclusion of the audit, a conference was held by Eagle's audit team with Respondent's representatives regarding the findings and the amounts of monies still owed. Because Respondent did not come into the office that day, a telephone conference was also held with her about the audit. Thereafter a formal written audit report was prepared by Eagle and provided to Respondent.

At the time of the audit, Respondent had not yet submitted to Eagle any of the funds collected during the month of March. The audit included a calculation of the monies owed. Although Respondent was contractually obligated to disburse funds within 15 days after the end of the month in which funds were collected, no payment of the March collections was ever made.

On April 20, 2004, Eagle then sent a "cease and desist" letter to Respondent, directing her and her office to discontinue any further collection activities on Eagle's behalf and to remit all collected but unpaid funds.[3] The letter also indicated that, as of March 31, 2004, Respondent

[3] Eagle also notified its debtors that no future payments were to be made to Respondent's office.

owed Eagle the sum of $48,521.40, plus any additional monies collected during the month of April. During the instant trial, Rhonda Renz, the Eagle representative heading up the 2004 audit, testified that the total net amount of money owed by Respondent to Eagle totaled $52,628.27. Ms. Renz was a very qualified and highly credible witness on the issues related to the audit and the funds owed by Respondent, and the court finds her testimony regarding the amount of money previously owed by Respondent to Eagle to be clear, convincing, and true. To date those funds have not been paid.

Count 1 – Rule 4-100(B)(4) [Failure to Pay Client Funds Promptly]

Rule 4-100(B)(4) of the Rules of Professional Conduct requires attorneys to "[p]romptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive." By the end of March 2004, Respondent had collected $48,521.40 of funds owed by Respondent to Eagle. By the end of April this figure had grown to $52,628.27. Despite a contractual agreement whereby Respondent was obligated to disburse such funds within 15 days of the end of the month in which the funds were received, and notwithstanding the demand letter of April 20, 2004, Respondent has failed to pay any of such funds to Eagle. This failure by her constitutes a willful violation of her of her duties under Rule 4-100(A).

Count 2 – Rule of Professional Conduct, Rule 4-100(A) [Failure to Maintain Client Funds in Trust Account]
Count 4 – Rule 4-100(A) [Failure to Deposit Client Funds in Trust Account]

Rule 4-100(A) of the Rules of Professional Conduct requires that all funds received or held for the benefit of clients by an attorney or law firm shall be deposited and maintained in a designated client trust account. As set forth above, as of the date the audit was conducted on April 5, 2004, Respondent had collected nearly $50,000, which should have been deposited and maintained in a client trust account so as to be available for disbursement to Eagle. On that date,

April 5, those funds were not, in fact, being held in a client trust account at all. The balance of respondent's formal client trust account (account number 1147234) was only $1,769.64 on that date, as it was for virtually the entire month of April. Worse, the balance of the "disbursement" account (account number 1147919), which Respondent used to handle the funds collected for Eagle, was a negative $6,857.84.

Further, during the period when Respondent was authorized to collect funds on behalf of Eagle not all of the money being received by Respondent's office on behalf of Eagle was being deposited into either of the above accounts, or into any other bank account for the benefit of Eagle. Respondent opined during the trial that this diversion of funds was not by her, but was instead done by Cambric. There is adequate evidence in the documents placed in evidence by the State Bar for this court to agree with her in that conclusion. Nonetheless, Respondent is responsible for allowing Cambric to continue in a position of responsibility well after she was on notice of questionable transactions by him with funds held by Respondent for the benefit of her client. He was also allowed to have access to the client funds even after prior checks had bounced and after people close to Respondent had expressed concerns to her about his integrity.

Respondent was the person ultimately responsible for the handling of the money belonging to her client. Her failure here to monitor adequately the performance of her staff and to take corrective and prophylactic measures constituted, at a minimum, gross negligence. In turn, the failure by Respondent and her office to deposit and maintain all client funds in a client trust account represents a willful violation by Respondent of her duties under Rule 4-100(A)[4].

Count 3 – Section 6106 [Moral Turpitude–Misappropriation]

[4] The conduct underlying this violation is essentially the same as that underlying the finding, below, that respondent is culpable of the more serious misconduct of committing acts of moral turpitude (misappropriation) in wilful violation of section 6106. Accordingly, the court finds no need to assess any additional discipline as a consequence of it. (See *In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.)

Section 6106 of the Business and Professions Code prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. While moral turpitude generally requires a certain level of intent, guilty knowledge, or willfulness, a finding of gross negligence will support such a charge where an attorney's fiduciary obligations, particularly trust account duties, are involved. (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410; *Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020; *In the Matter of Rubens* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 468, 478; *In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195, 208.)

It is clear that substantial funds belonging to Eagle were collected by Respondent's office and then misappropriated. While Respondent testified at length that her employee Cambric was guilty of embezzling the funds, such a fact does not exonerate her from culpability of an act of moral turpitude. (*In the Matter of Malek-Yonan* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 627.) Her supervision of the firm's bank account and disbursements was unacceptably lax; she did not have adequate or reasonable office procedural safeguards in place; she was aware in October 2003 of issues of Cambric mishandling the bank accounts; and she nonetheless continued to allow him to have access to the funds in those accounts and she failed to exercise increased diligence to verify no future mishandling occurred. This failure to adequately supervise the handling of her client's funds constituted gross negligence, at a minimum. In turn, the misappropriation of the funds entrusted to her for safekeeping constituted an acto of moral turpitude, in violation of section 6106.

Count 5 – Section 6106 [Moral Turpitude-Issuing NSF Checks]

In this count the State Bar alleges that Respondent's gross negligence in overseeing the management of the funds collected for her client Eagle, conduct which included the issuance of

checks to the client when there were insufficient funds for those checks, constituted acts of moral turpitude. This court agrees.

Respondent had a duty to exercise diligence in overseeing the handling of the funds of her client. She was aware as early as October 2003 that Cambric was mishandling those funds at times; nonetheless, she neither took away his authority to write checks on the funds holding the account nor sufficiently increased her supervision of the account to verify whether it was being handled appropriately. It was not. An NSF check was issued to Eagle in January 2004; another issued in February. While Eagle did not ignore the "red flags" these checks represented, Respondent chose either to ignore or remain oblivious to them. Given the history of Respondent's awareness of Cambric's mishandling of the account, such a cavalier approach constitutes at least gross negligence and would arguably be better described as reckless. In either event, it amounts to an act of moral turpitude and a willful violation of section 6106.

Count 6 – Section 6106 [Misuse of Client Trust Account]

In this count the State Bar alleged that Respondent willfully violated Rule 4-100(A) by misusing a bank account labeled "Trust Account," "Client's Funds Account" or words of similar import, by issuing checks for personal and business purposes from that account. The count goes on to allege that "between in and about September 2003 and in or about May 2004, Respondent issued checks and electronic debits drawn upon her CTA to pay her personal and business expenses…" In a stipulation executed by the parties and filed with the court, Respondent stipulated that, "Between September 2003 and May 2004, Respondent issued checks and electronic debits drawn upon her CTA to pay her personal and business expense[.]" At trial, however, it became clear that there was disagreement as to whether the "disbursement account" (also referred to by Respondent as the "clearing" account) was actually a client trust account.

The parties then indicated that an amended stipulation on that point would be prepared and filed. That did not happen.

Although the State Bar alleges that the disbursement account was a bank account labeled "Trust Account," "Client's Funds Account" or words of similar import, the only label placed on the account was the term "Disbursement Account." Such an ambiguous designation does not signify that the funds were being held in a client trust account. Nor does a member's describing a regular bank account with such terminology, without more, make the account a qualifying client trust account under the State Bar rules. There was no evidence suggesting that the account was either set up in accordance with subsections (a) or (b) of Business & Professions Code section 6211 or established with the bank such that the bank's overdraft notification procedures set forth in section 6091.1 would be triggered.

Although the NDC here treated the "disbursement account" as being a CTA for all purposes, there is no evidence that it ever was one. The misconduct here was not that this account contained the personal funds of Respondent or was used to pay non-client expenses; it was that client funds were ever placed in the account at all.

Accordingly, this count is dismissed with prejudice

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)[5] The court finds the following to be aggravating factors.

Multiple Acts of Misconduct

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)

[5] All further references to standard(s) are to this source.

Significant Harm

Respondent's misconduct significantly harmed her client. (Std. 1.2(b)(iv).) Eagle did not receive a substantial amount of money collected by Respondent's office on its behalf.

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Standard 1.2(e).) The court finds the following with respect to possible mitigating factors.

No Prior Discipline

Respondent was admitted to practice in California in June 1989. She practiced law for nearly 15 years prior to the instant misconduct commencing and has now practiced for twenty years. During that span, Respondent had no prior record of discipline. This lengthy tenure of discipline-free practice is a mitigating factor. (Std. 1.2(e)(i); *Edwards v. State Bar* (1990) 52 Cal.3d 28, 31; *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591.)

Cooperation

Respondent did not admit culpability in the matter but entered into an extensive stipulation of facts, thereby assisting the State Bar in the prosecution of the case. For such conduct Respondent is entitled to some mitigation. (Std. 1.2(e)(v); see also *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50 ; cf., *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [credit for stipulating to facts but "very limited" where culpability is denied].)

Character Evidence

Respondent presented good character testimony from numerous witnesses, including family members, friends, her pastor, and members of her community. These witnesses represent a wide range of references and these witnesses were generally aware the Respondent's misconduct. Thus, Respondent is entitled to mitigation for this good character evidence. (Std. 1.2(e)(vi); *In the Matter of Davis, supra,* 4 Cal. State Bar Ct. Rptr. at pp. 591-2.)

Family Problems/Medical Issues

Respondent offered evidence regarding problems she has had in the past, including the death of her child in 1998 and the sudden and unexpected onset of her husband's diabetes and resulting blindness in April 2004. Without discounting the impact that these traumatic events had on Respondent at the time of their occurrence, they do not account for the misconduct giving rise to culpability here.

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession, and maintain the highest possible professional standards for attorneys.

The primary purposes of attorney discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Although the standards are not binding, they are to be afforded great weight because "they promote the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is "not bound to follow the standards in talismanic fashion. As the final

and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender.' [Citations.]" (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994, quoting *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the courts consider relevant decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In the present proceeding, the most severe sanction for Respondent's misconduct is found in standard 2.2, which provides: "Culpability of a member of wilful misappropriation of entrusted funds or property shall result in disbarment. Only if the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a one-year actual suspension, irrespective of mitigating circumstances."

As stated by the Supreme Court in *Lipson v. State Bar* (1991) 53 Cal. 3d 1010, 1022, with regard to Standard 2.2:

> We do not, however, follow the standards in a rigid fashion. (*Howard v. State Bar*, *supra*, 51 Cal.3d at p. 221.) The standard's requirement of disbarment in the absence of compelling mitigating circumstances should be viewed as a guideline rather than as an inflexible rule. (See *Edwards v. State Bar* (1990) 52 Cal.3d 28, 38 [276 Cal.Rptr. 153, 801 P.2d 396].)
>
> Even where the most compelling mitigating circumstances do not clearly predominate, we have recognized extenuating circumstances relating to the facts of the

> misappropriation that render disbarment inappropriate. In *Edwards*, *supra*, we said: "As the term is used in attorney discipline cases, 'willful misappropriation' covers a broad range of conduct varying significantly in the degree of culpability. An attorney who deliberately takes a client's funds, intending to keep them permanently, and answers the client's inquiries with lies and evasions, is deserving of more severe discipline than an attorney who has acted negligently, without intent to deprive and without acts of deception . . . . Disbarment would rarely, if ever, be an appropriate discipline for an attorney whose only misconduct was a single act of misappropriation, unaccompanied by acts of deceit or other aggravating factors." (52 Cal.3d at p. 38.)
>
> Although petitioner's misconduct did not involve the deliberate intent and deceit that would require disbarment, his misconduct went beyond a single act of misappropriation. Petitioner also failed to comply with the requirements of former rule 5-101 when he solicited loans from two clients, issued numerous checks on insufficient funds, and failed to make restitution to his clients who suffered substantial harm because of his misconduct.

The Supreme Court concluded in that case that the appropriate discipline there was five years' suspension, stayed; five years' probation; and actual suspension of a minimum of two years and until the member made restitution to the client of the misappropriated funds (plus interest) and showed proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii).

In light of the nature of Respondent's misconduct here, the absence of any demonstrated intentional misconduct by her, the magnitude of the funds misappropriated, and the period of time during which the misappropriation was allowed to occur, the court concludes that the same discipline as ordered by the Supreme Court in *Lipson* adequately addresses the instant situation as well. (See also *In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411.)

RECOMMENDED DISCIPLINE

For all of the above reasons, it is recommended that **Sharon L. Barnes** be suspended from the practice of law for five years; that execution of that suspension be stayed; that she be placed on probation for five years, with the following conditions:

1. Respondent must be actually suspended from the practice of law for the first two years of probation and until: (1) she makes restitution to Eagle Credit Resources, LLP (or its legal

successor) in the amount of $52,628.27, plus 10% interest per annum from April 20, 2004 (or to the Client Security Fund to the extent of any payment from the fund to Eagle Credit Resources, LLP, plus interest and costs, in accordance with section 6140.5), and furnishes satisfactory proof thereof to the State Bar's Office of Probation; and (2) she provides proof to the satisfaction of the State Bar Court of her rehabilitation, present fitness to practice, and present learning and ability in the general law pursuant to standard 1.4(c)(ii).

2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation.

3. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation, her current office address and telephone number or, *if no office is maintained,* an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation, her current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

4. Respondent must report, in writing, to the State Bar's Office of Probation no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which Respondent is on probation (reporting dates). However, if Respondent's probation begins less than 30 days before a reporting date, Respondent may submit the first report no later than the second reporting date after the beginning of her probation. In each

report, Respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

(a) in the first report, whether Respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and

(b) in each subsequent report, whether Respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period.

During the last 20 days of this probation, Respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, Respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

5. Subject to the proper or good faith assertion of any applicable privilege, Respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to Respondent, whether orally or in writing, relating to whether Respondent is complying or has complied with the conditions of this probation.

6. Within one year after the effective date of the Supreme Court order in this matter, Respondent must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of such completion to the State Bar's Office of Probation. This condition of probation is separate and apart from Respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, Respondent is ordered

not to claim any MCLE credit for attending and completing this course. (Rules Proc. of State Bar, rule 3201.)

7. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter.

MPRE

It is further recommended that Respondent take and pass the Multistate Professional Responsibility Examination during the period of her actual suspension. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.)

Rule 9.20

The court recommends that Respondent be ordered to comply with California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.[6]

Costs

It is further recommended that costs be awarded to the State Bar in accordance with section 6086.10 and that such costs be enforceable both as provided in section 6140.7 and as a money judgment.

Dated: December _____, 2009

DONALD F. MILES
Judge of the State Bar Court

[6] Respondent is required to file a rule 9.20(c) affidavit even if she has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or a contempt, an attorney's failure to comply with rule 9.20 is also, *inter alia*, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)